



DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 272

[FNS-2022-0005]

RIN 0584-AE86

Supplemental Nutrition Assistance Program: Revision of Civil Rights Data

Collection Methods

AGENCY: Food and Nutrition Service (FNS), Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This rule finalizes provisions of a proposed rule published on June 27, 2022. With this final rule, the Food and Nutrition Service (FNS) is revising Supplemental Nutrition Assistance Program (SNAP) regulations that cover collecting and reporting race and ethnicity data by State agencies on persons receiving benefits from SNAP. This rule removes regulatory language that provides an example that State agencies might collect race and ethnicity data by observation (also referred to as “visual observation”) when participants do not voluntarily provide the information on the application form. In addition, based on feedback from the commenters, this rule prohibits using visual observation as a data collection method for race and ethnicity. Through this rulemaking, FNS intends to improve the quality of data collected for purposes of Federal civil rights law and policy including title VI of the Civil Rights Act of 1964. USDA's Food and Nutrition Service is committed to promoting equity and inclusion through its Federal nutrition assistance programs. This regulatory change is consistent with this Administration's priorities and furthers FNS' commitment to building equitable and inclusive systems for nutrition access.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

Current Policy

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs receiving Federal financial assistance. Additionally, Department of Justice (DOJ) regulations at title 28 of the Code of Federal Regulations (CFR), § 42.406(a),¹ require all Federal agencies to provide guidelines for the collection of race and ethnicity data from applicants and beneficiaries of Federal assistance programs sufficient to permit effective enforcement of title VI. Accordingly, SNAP regulations at 7 CFR 272.6(g) and (h) require State agencies to collect race and ethnicity data on participating households and report the data to FNS to help ensure program benefits are distributed without regard to race, color, or national origin. FNS uses this data to determine how effectively FNS programs are reaching potential eligible persons and beneficiaries, identify areas where additional outreach is needed, assist in the selection of locations for compliance reviews, and complete reports, as required. State agencies report aggregate race and ethnicity data to FNS annually via the form FNS-101, “Participation in Food Programs by Race” (Office of Management and Budget (OMB) Control Number 0584-0594, expiration 7/31/2023). FNS uses this aggregate data to

¹ <https://www.ecfr.gov/current/title-28/chapter-I/part-42/subpart-F/section-42.406>.

conduct compliance reviews and investigations, identify trends or disparities that affect participation goals and opportunities to address them, and identify any potential adverse or disproportionate impacts when developing program policy.

Per 7 CFR 272.6(g), State agencies that administer SNAP are required to collect data on participants' race and ethnicity in the manner specified by FNS. The regulations provide that the application form must clearly indicate that the information is voluntary and that it will not affect the eligibility or the level of benefits. SNAP regulations at 7 CFR 272.6(g) also require State agencies to develop alternative means of collecting race and ethnicity data on households, such as by observation during the interview, when the information is not provided voluntarily by the household on the application form.

Proposed Action

In the proposed rule, Supplemental Nutrition Assistance Program: Revision of Civil Rights Data (87 FR 38010), FNS proposed to update SNAP regulations at 7 CFR 272.6(g) to remove the example of visual observation during the interview as an alternative means of collecting race and ethnicity data when not voluntarily provided by a household on the application form. FNS had several reasons for making this change. FNS cited the need to comply with OMB Directive 15, Standards for the Classification of Federal Data on Race and Ethnicity;² which provides that self-identification is the preferred means for gaining information about an individual's race and ethnicity, when practicable, and notes that when these data points are collected through observation, they are likely to be very different than from the information obtained when respondents report about themselves, especially in populations with multiple racial heritages. In addition, there was a desire to be in line with updated FNS Civil Rights Division and Child Nutrition Programs guidance,³ which was supported by a recent Centers for

² 62 FR 58782 (October 30, 1997) (<https://www.govinfo.gov/content/pkg/FR-1997-10-30/pdf/97-28653.pdf>).

³ <https://www.fns.usda.gov/cn/Race-and-Ethnicity-Data-Policy-Rescission>.

Medicare and Medicaid Services (CMS) study that assessed the quality of race and ethnicity information in observational health databases.⁴ These documents indicate that a third party's observation of an individual's appearance is not a reliable means to capture how a participant self-identifies their own race or ethnicity identity.

II. General Summary of Comments and Explanation of Revision

During the 60-day public comment period on the proposed rule, which ended on August 26, 2022, FNS received 14 comments. Five commenters were members of the public, one was a State agency that administers SNAP, six were research and advocacy organizations, and two were associations representing health and human service agency leaders and nutrition education administrators. All the commenters supported the proposal to remove visual observation as an alternative data collection method for race and ethnicity, and one commenter recommended that FNS explicitly prohibit using visual observation as a data collection method in the final rule. Several commenters questioned why other alternative data collection methods remain in the rule after visual observation is being removed. Two commenters recommended that FNS remove the ability for States to use alternative data collection methods noting that if an individual chooses not to provide the information, States should not try to collect it. One commenter encouraged FNS to gather best practices for alternative data collection methods, and one commenter expressed concerns about using aggregate data as an alternative data collection method.

FNS agrees that it is important to clearly state that the final rule removes the option to use visual observation and amends the regulatory language at 7 CFR 272.6(g) to expressly prohibit using that option. FNS has updated language in the final rule but will continue to allow other alternative methods of data collection. FNS cannot eliminate the option to use alternative data collection methods in this final rule. The use of alternate

⁴ Polubriaginof FCG, Ryan P, Salmasian H, et al. Challenges with quality of race and ethnicity data in observational databases. J Am Med Informatics Assoc. 2019. doi:10.1093/jamia/ocz113.

data collection methods is required by OMB Directive 15. To ensure compliance with title VI of the Civil Rights Act of 1964 and associated regulations, FNS will retain requirements at regulation 7 CFR 272.6(g) for State agencies to develop alternative means of collecting race and ethnicity data when participants do not self-identify. However, FNS recognizes that there are challenges associated with the use of alternative methods of data collection for race and ethnicity, such as choosing and obtaining appropriate data sources, and keeping up with emerging technology and tools. Therefore, FNS will gather and disseminate to State agencies information on best practices for developing alternative means of collecting race and ethnicity data when participants do not self-identify, including considerations when using aggregate data.

One commenter suggested that FNS should ensure that when State agencies use other data sources to collect race and ethnicity data, the State should clearly identify the data sources and verify that visual observation was not utilized. FNS recognizes the need to support compliance with requirements at 7 CFR 272.6(g) and agrees with the commentor. FNS will incorporate review of State alternative methods for collection of race and ethnicity data into its ongoing oversight and management evaluation processes (e.g., Civil Rights and/or Program Access reviews) and will require corrective actions, as needed.

One commenter suggested increasing the number of race and ethnicity options available for SNAP applicants to self-identify. SNAP regulations at 7 CFR 272.6(g) and (h) do not specify the race and ethnicity options that State agencies must provide to SNAP applicants for self-identification. However, FNS requires State agencies to annually submit the “Participation in Food Programs – By Race” (FNS-101) form, which includes selected race and ethnicity options. OMB currently has an ongoing effort to gather public comments to improve the quality and usefulness of Federal race and ethnicity data, including through improved race and ethnicity options. FNS will consider

information obtained through OMB's effort when considering future changes to the FNS-101 race and ethnicity options. Additionally, FNS 113-1 Civil Rights Compliance and Enforcement Instruction states that "A State agency may have categories for race in addition to the ones required by FNS; however, the additional categories must be mapped and extracted to the FNS-required categories."

Procedural Matters

Executive Order 12866, 13563 and 14094

Executive Orders 12866, 13563, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Management and Budget has determined this rule to be not significant under Executive Order 12866.

Regulatory Impact Analysis

This rule has been designated as not significant by the Office of Management and Budget. Therefore, no Regulatory Impact Analysis is required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, the Secretary certifies that this rule would not have a significant impact on a substantial number of small entities. This rule will not have an impact on small entities because the changes required by the regulations are directed toward State agencies operating SNAP.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for rules with “Federal mandates” that may result in expenditures by State, local, or Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and Tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the **Federal Register** notice published June 24, 1983 (48 FR 29115), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism

implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

The Department has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under section 6(b) of the Executive order, a federalism summary impact statement is not required.

Executive Order 12988, Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed the rule, in accordance with Department Regulation 4300-004, Civil Rights Impact Analysis, to identify and address any major civil rights impacts the rule might have on minorities, women, individuals with disabilities and individuals with limited English proficiency (LEP). The changes to SNAP regulations in this rule are to remove the option for visual observation for race and ethnicity data collection from SNAP regulations. After careful review of the rule's intent and provisions and available data sets, FNS anticipates that the promulgation of this rule will increase the accuracy of data collected on the race and ethnicity of SNAP households by reducing errors in data collection caused by inaccurate visual observation. While this rule does provide for the collection of race and ethnicity data of SNAP households, as required by Federal law, it does not change any eligibility criteria.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. FNS determined that this rule does not require Tribal consultation. We are unaware of any current Tribal laws that could be in conflict with this rule.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires OMB approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number under the Paperwork Reduction Act of 1995.

Information collection activities associated with this rule are approved under existing OMB Control Numbers. OMB Control Number 0584-0064 (expiration 02/29/2024) includes burden estimates associated with the collection of race and ethnicity data on SNAP applications. OMB Control Number 0584-0594 (expiration 07/31/2023) includes burden estimates associated with race and ethnicity data reporting on the form FNS-101, “Participation in Food Programs – by Race”. The requirements in this rule do not introduce any new or changed information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

The Department is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 272

Civil rights, Claims, Grant programs—social programs, Reporting and recordkeeping requirements, Unemployment compensation, Wages.

Accordingly, 7 CFR part 272 is amended as follows:

PART 272 – REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

1. The authority citation for part 272 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

2. In § 272.6, amend paragraph (g) by revising the third sentence and adding a fourth sentence to read as follows:

§ 272.6 Nondiscrimination compliance.

* * * * *

(g) * * * The State agency must develop alternative means of collecting the ethnic and racial data on households when the information is not provided voluntarily by the household on the application form. These alternative means of data collection shall not include observation (also known as visual observation).

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Cynthia Long,

Administrator,

Food and Nutrition Service.

[FR Doc. 2023-27351 Filed: 12/13/2023 8:45 am; Publication Date: 12/14/2023]